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No. 07-449

IN THE
Supreme Court of the United States

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., AND NTN-BCA CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR TIMKEN US CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

Should the U.S. Court of Appeals for the Federal Circuit set aside an antidumping determination made by the U.S. Department of Commerce that is the subject of an adverse decision by the World Trade Organization's Dispute Settlement Body, if that WTO decision has not yet been implemented pursuant to the express statutory scheme, the statute governing implementation of WTO decisions expressly precludes the relief sought by the desired remand, and Commerce's determination conforms with current, unchanged, U.S. law?

Should the Court reverse the determinations of the Court of Appeals for the Federal Circuit and the U.S. Court of International Trade that Commerce's decisions regarding the calculation of adjustments for NTN's freight expenses were reasonable and supported by the record?

PARTIES TO THE PROCEEDING

Timken US Corporation is a party to the proceeding, but is not listed in the caption. Timken US Corporation was formerly known as the Torrington Company.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Timken US Corporation is a wholly-owned subsidiary of The Timken Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 4

A. U.S. implementation of adverse WTO dispute settlement decisions 4

B. The particular WTO decisions invoked by the petitioners, and their aftermath 6

C. The contested agency determination 7

D. WTO dispute settlement decisions, generally 10

E. Commerce's calculation of weighted average dumping margins, in its statutory context 14

F. Prior judicial review of the Commerce's method 16

REASONS FOR DENYING THE PETITION 19

I. The Court of Appeals for the Federal Circuit correctly declined to set aside Commerce's decision on the basis of an adverse decision of the World Trade Organization 19

A. The result sought by the petitioners is precluded by the statute 19

B. There is no reason to remand to allow the agency to apply a new policy, because there has been no change in the agency's policy 22

C. The Court of Appeals for the Federal Circuit was not at liberty to set aside current law in order to anticipate (yet unknown) implementation decisions that can be made only by the Executive Branch 24

II. The Court of Appeals for the Federal Circuit and the Court of International Trade correctly affirmed Commerce's recalculation of NTN's freight expenses 28

CONCLUSION 30

APPENDIX -- STATUTORY PROVISIONS 1A

19 U.S.C. § 1673. Imposition of antidumping duties 1A

19 U.S.C. § 1675. Administrative review of determinations 3A

19 U.S.C. § 1677. Definitions; special rules 7A

19 U.S.C. § 3512. Relationship of agreements to United States law and State law 9A

19 U.S.C. § 3533. Dispute settlement panels and procedures 11A

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 19

Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138 (Ct. Int'l Trade 1996) 16

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) 27

Corus Engineering Steels Ltd. v. United States, 27 CIT 1286, 2003 WL 22020504, Slip Op. 03-110 (Ct. Int'l Trade Aug. 27, 2003) 17

Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp.2d 1253 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006) 17

Corus Staal BV v. United States, 2006 WL 2056401, Slip Op. 06-112 (Ct. Int'l Trade July 25, 2006) 18

Corus Staal BV v. United States, 387 F. Supp.2d 1291 (Ct. Int'l Trade 2005), *aff'd*, 186 Fed. Appx. 997 (Fed. Cir. 2006), *rehearing en banc denied* (Sept. 12, 2006), *cert. denied*, 127 S. Ct. 3001 (2007) 17

Dorbest Ltd. v. United States, 462 F. Supp.2d. 1262 (Ct. Int'l Trade 2006) 18

In re Rath, 402 F.3d 1207 (Fed. Cir. 2005) 11

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 27

Koyo Seiko Co. Ltd. v. United States, 442 F. Supp.2d 1360 (Ct. Int'l Trade 2006) 18

Koyo Seiko Co., Ltd. v. United States, 2007 WL 2809332, Slip Op. 07-128 (Ct. Int'l Trade Sept. 27, 2007) 18

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 14

NLRB v. Food Store Employees Union, 417 U.S. 1 (1974) 22, 24

Norsk Hydro Canada Inc., v. U.S., 472 F.3d 1347 (Fed. Cir. 2006) 11

NSK Ltd. v. United States, 346 F. Supp.2d 1312 (Ct. Int'l Trade 2004), *aff'd on other grounds*, 481 F.3d 1355 (Fed. Cir. 2007), *petition reh'g denied* (May 3, 2007) 17

NSK Ltd. v. United States, 346 F. Supp.2d 1312 (Ct. Int'l Trade 2004), *aff'd*, 481 F.3d 1355 (Fed. Cir. 2007), *reh'g denied* (May 3, 2007) 10

NSK Ltd. v. United States, 416 F. Supp.2d 1334 (Ct. Int'l Trade 2006) 17

PAM, S.p.A. v. U.S. Dep't of Commerce, 265 F. Supp.2d 1362 (Ct. Int'l Trade 2003) 17

Paul Müller Industrie GmbH & Co. v. United States, 435 F. Supp.2d 1241 (Ct. Int'l Trade 2006), *reconsideration on other grounds denied by*, 442 F. Supp.2d 1363 (Ct. Int'l Trade 2006), *appeals filed* (Fed. Cir. 07-

1547, -1563) (Sept. 11, 2007) 18

Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir. 2001) 14

Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F. Supp. 1354 (Ct. Int'l Trade 1987) 16

SKF USA Inc. v. United States, 491 F. Supp.2d 1354 (Ct. Int'l Trade 2007), *appeal filed* (Fed. Cir. 07-1502) (Aug. 9, 2007) 18

Slater Steels Corp. v. United States, 297 F. Supp.2d 1351 (Ct. Int'l Trade 2003), *aff'd on other grounds*, 159 Fed. Appx. 1007 (Fed. Cir. Dec. 6, 2005) 17

Timken Co. v. United States, 240 F. Supp.2d 1228 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004) 17

Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004) 16

Statutes

19 U.S.C. § 1202 3

19 U.S.C. § 1671 ..... 2, 4, 5

19 U.S.C. § 1673b(d) 7

19 U.S.C. § 1673d(c) 7

19 U.S.C. § 1673e(a) 7

19 U.S.C. § 1675(a) 8

19 U.S.C. § 1677 4

19 U.S.C. § 1677(34) 14

19 U.S.C. § 1677(35) 14, 15

19 U.S.C. § 1677e(a) 28

19 U.S.C. § 1677e(b) 28, 29

19 U.S.C. § 1677m(d) 28, 29

19 U.S.C. § 3533 2

19 U.S.C. § 3538 ..... 2, 4, 5, 19, 21

The Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, Dec. 8, 1994, 108 Stat. 4809 ..... 2, 4, 11, 19

Regulations

19 C.F.R. § 351.212 8

19 C.F.R. § 353.2(f) (1993) 15

Antidumping Duties, Final Rule, 54 Fed. Reg. 12742 (Dep't Comm. Mar. 28, 1989) 15

Administrative Decisions

Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan, 54 Fed. Reg. 20904 (Dep't Comm. May 15, 1989) 7

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During

an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006) 7, 23

Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 Fed. Reg. 55780 (Dep't Comm. Aug. 30, 2002) 9

Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261 (Dep't Comm. May 4, 2007) 22

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36067 (Dep't Comm. May 22, 2002) 26

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 Fed. Reg. 22636 (Dep't Comm. May 2, 2005) 26

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel

Products from Japan, 67 Fed. Reg. 71936 (Dep't Comm. Dec. 3, 2002) 22

Legislative History

103d Cong., 2d Sess., H.R. Doc. No. 103-826(1) (1994), *reprinted in* 1994 U.S.C.C.A.N., Vol. 6, 3773 21

Trade Agreements Act of 1979, 96th Cong., 1st Sess., H.R. Rep. No. 96-317 8

Uruguay Round Agreements Act, 103d Cong. 2d Sess., S. Rep. No. 103-412 (1994) 15, 21

Uruguay Round Agreements Act, *Statement of Administrative Action*, 103d Cong., 2d Sess., H.R. Doc. No. 103-316, Vol. 1, 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. Vol. 6, 4040 ..... 11, 12, 13, 21, 24, 25

Other Authority

Agreement Establishing the World Trade Organization, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, 1327 (1994) 10

Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (a/k/a the Antidumping Agreement), *reprinted in* H.R. Doc. No. 103-316, Vol. 1, 1453 (1994) 10

Restatement of the Law, Third, The Foreign Relations Law of the United States, Vol. I, §101 and §102(3) 14

U.S. Statement at the WTO Dispute

Settlement Body Meeting, delivered by David P. Shark, Deputy Chief of U.S. Mission to the WTO at Geneva, (Feb. 20, 2007) 7

World Trade Organization, *Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) 6

World Trade Organization, *Japan - Taxes on Alcoholic Beverages, AB-1996-2*, WT/DS8/AB/R (Oct. 4, 1996) 13

World Trade Organization, *Understanding Governing the Rules and Procedures Governing the Settlement of Disputes, reprinted in* H.R. Doc. No. 103-316, Vol. 1., 1008 ..... 10, 11, 12, 13, 24, 25

World Trade Organization, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006) 6

World Trade Organization, *United States - Tax Treatment for "Foreign Sales Corporations*, ... 14

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BRIEF OF TIMKEN US CORPORATION IN OPPOSITION

OPINIONS BELOW

Timken US Corporation is satisfied with the presentation contained in the petition.

JURISDICTION

Timken US Corporation is satisfied with the presentation contained in the petition.

STATUTES AND REGULATIONS INVOLVED

As in their previous petition (No. 06-1632), the petitioners omit the statutory provisions that ad-

dress their arguments regarding the effect of certain dispute settlement decisions reached by the World Trade Organization (WTO "panel reports" and "Appellate Body" decisions).

The Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, Dec. 8, 1994, 108 Stat. 4809, at Sections 123 and 129, codified as 19 U.S.C. §§ 3533 and 3538, prescribe in detail the procedures to be followed after an adverse WTO panel report or WTO Appellate Body decision. Opp. App. at 11A-13A. Section 129 of the URAA, 19 U.S.C. § 3538 disposes of petitioners' claims, and is set forth here, in relevant part:

19 U.S.C. § 3538. Administrative action following WTO panel reports

* * *

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. § 1202 *et seq.*], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] that are implemented under this section *shall apply with respect to unliquidated entries of the subject merchandise* (as defined in section 771 of that Act [19 U.S.C. § 1677]) *that are entered, or withdrawn from warehouse, for consumption on or after-*

> **(A)** in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> **(B)** *in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.*
>
> * * *

(Pub. L. 103-465, Title I, Sec. 129, Dec. 8, 1994, 108 Stat. 4836) (emphasis added).

STATEMENT OF THE CASE

A. U.S. implementation of adverse WTO dispute settlement decisions

Section 129(b) of the URAA, 19 U.S.C. § 3538(b) (*supra*, Statute and Regulations involved) prescribes

procedures if a WTO dispute panel or Appellate Body report "contains findings that an action by [the U.S. Department of Commerce] in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Duty Measures... ."

Section 129(b) applies here, as the petitioners contest an action by Commerce in an antidumping proceeding (in this case: Commerce's calculation of the weighted-average dumping margin in the twelfth annual review, for subject bearings imported from May 1, 2000 to April 30, 2001). Section 129(c)(1)(B), 19 U.S.C. § 3538(c)(1)(B), prescribes the effect of any implementation determinations, if made, on Commerce determinations like the one in issue here: they apply to *entries of merchandise imported on or after the date on which the United States Trade Representative directs Commerce to implement the adverse WTO decision.*

All the imports in issue here were imported prior even to the adverse WTO decision in question (which was issued on January 9, 2007), and, necessarily, prior to any decision to implement the adverse decision, since such a decision has not yet been made. Hence, the entries of concern to the petitioners cannot be affected by any decision to implement the adverse WTO decision, even if such a decision should be made.

B. The particular WTO decisions invoked by the petitioners, and their aftermath

Following a complaint by the Government of Japan, a WTO dispute panel reported that Commerce's calculation of the weighted-average dumping margin (including "zeroing"), as done in administrative reviews (including the review in issue in this case), was *consistent* with the Antidumping Agreement. WTO, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006), at Paras. 7.227 and 7.259(b)-(c). This panel report, however, was reversed by a subsequent decision of the Appellate Body, which was adopted by the DSB on Jan. 23, 2007. WTO, *Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007), at Para. 190(e) (findings and conclusions); Pet. at 18.

Petitioners repeatedly assert or imply that the United States has already agreed to abandon zeroing in antidumping administrative reviews, such as the review in issue here. *See, e.g.*, Pet. at 6 (the United States has asserted that "it has changed its policies in conformance" with an adverse WTO decision"), 7 (the United States "announced its intention to change its practice"), and 19 (the United States has "announced that it will change the methodology used in its decision.").

This is incorrect. The United States indicated only that "it intended to comply in this dispute with its WTO obligations and will be considering carefully how to do so." "U.S. Statements at the WTO Dispute Settlement Body Meeting," delivered by David P.

Shark, Deputy Chief of U.S. Mission to the WTO at Geneva, at Item 2.A (Feb. 20, 2007), available at: www.geneva.usmission.gov/Press2007/0424DSB. *Accord*, Pet. at 18-19 and 108a (minutes of DSB meeting – reflecting U.S. statement).

Moreover, as will be addressed in further detail in the argument, while the Department of Commerce has made modifications to its practice in response to a different WTO decision, it has limited those modifications to *investigations*, and expressly excluded the application of these changes in other segments of antidumping proceedings, such as antidumping annual reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722, 77724 (Dep't Comm. Dec. 27, 2006).

C. The contested agency determination

In 1989, Commerce and the United States International Trade Commission determined that antifriction bearings imported from, *inter alia*, Japan were sold at less than fair value in the United States, and that such imports injured the domestic industry producing like products. These determinations resulted in the imposition of antidumping duty duties. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan*, 54 Fed. Reg. 20904 (Dep't Comm. May 15, 1989); 19 U.S.C. §§ 1673, 1673b(d), 1673d(c), 1673e(a).

The amount of antidumping duty to be assessed

is subject to annual antidumping administrative reviews by Commerce. The purpose of such a review is to calculate the dumping margin for "each entry" within the period of review, and to assess duties on the basis of these determinations. 19 U.S.C. § 1675(a)(1)(B), (2)(A) and (C). *See also* 19 C.F.R. § 351.212(b)(1). Absent review, entries are assessed at the deposit rates only. 19 C.F.R. § 351.212(c).[1]

At issue here is Commerce's calculation of dumping margins in the twelfth annual review of the antidumping duty order on ball bearings from Japan. This review covered subject bearings imported from May 1, 2000 to April 30, 2001. The final results of

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[1] As explained in the legislative history of the 1979 amendments:

> In the case of a review of an antidumping duty order, the results of the review will include a determination of the foreign market value and the United States price of each entry of merchandise subject to that order and included within the review, and the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry. That determination will be the basis for the assessment of antidumping duties on entries of the merchandise included within the review and for deposits of estimated duty on entries not covered by the review.

Trade Agreements Act of 1979, 96th Cong., 1st Sess., H.R. Rep. No. 96-317, at 71-72 (describing the operation of the annual review procedure, introduced at that time). *See also* 19 C.F.R. § 351.212(a)-(c).

this review were published as *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 67 Fed. Reg. 55780 (Dep't Comm. Aug. 30, 2002). Pet. at App. D.

NTN is a Japanese producer and exporter of bearings to the United States. U.S. imports of bearings produced and exported by NTN were among the imports examined by Commerce in the subject antidumping annual review. In briefing to the agency during the antidumping administrative review, NTN contested various aspects of Commerce's methodology, including Commerce's recalculation of the adjustment for freight expenses, but *not* the zeroing issue. Likewise, in its appeals to the U.S. Court of International Trade ("CIT") and the U.S. Court of Appeals for the Federal Circuit ("CAFC"), NTN did not contest the zeroing issue in regular briefing.[2] As a result, the opinion of the CAFC did not address it. NTN raised the issue in motions to stay and in its petition for rehearing. *Infra*.

Commerce's final results were affirmed by the Court of International Trade, and by the CAFC. *NSK Ltd. v. United States*, 346 F. Supp.2d 1312 (Ct.

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[2] The zeroing calculation was contested by *other* parties (Asahi, NSK Japan, and NSK Europe) before the agency and the CIT. Pet. at 20a-31a (CIT decision). Asahi and NSK, however, dismissed their appeals to the CAFC, and NTN's appeal to the CAFC addressed freight expenses only. *Id.* at 2a-11a (CAFC decision).

Int'l Trade 2004) (Pet. at App. B), *aff'd*, 481 F.3d 1355 (Fed. Cir. 2007) (Pet. at App. A), *reh'g denied* (May 3, 2007).

Prior to the CAFC's affirmance, NTN asked the CAFC to stay its proceedings pending developments regarding a WTO complaint filed by the European Communities. Pet. at 16. The stay was denied. *Id.* Following the CAFC's affirmance of Commerce's decision, NTN petitioned the CAFC for panel rehearing or to stay or extend the mandate, in light of a decision by the World Trade Organization addressing a complaint by the Government of Japan concerning the use of zeroing in the subject annual review. *Id.* at 16-17; Pet. at App. H. This petition was denied. *Id.* at 17.

D. WTO dispute settlement decisions, generally

In 1994, the United States became a party to the Uruguay Round Agreements. These include the WTO Agreement,[3] the Antidumping Agreement[4] and the Dispute Settlement Understanding (DSU).[5]

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[3] Agreement Establishing the World Trade Organization, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1327-37 (1994) (including list of annexed materials).

[4] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (a/k/a the Antidumping Agreement), *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1453-77 (1994).

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* H.R. Doc. No.

These agreements, which are not treaties, are not self-executing, and have no independent domestic legal effect, were implemented in U.S. law by the URAA. *See, e.g.*, 19 U.S.C. §§ 3511 (approval) and 3512 (relation to U.S. law); *Norsk Hydro Canada Inc., v. U.S.*, 472 F.3d 1347, 1360, n.21 (Fed. Cir. 2006); *In re Rath*, 402 F.3d 1207, 1210, n.2 (Fed. Cir. 2005); *Uruguay Round Agreements Act, Statement of Administrative Action*, at 11-12, 103d Cong., 2d Sess., H.R. Doc. No. 103-316, Vol. 1, 656, at 667-68 (approval) and 669-770 (relation to U.S. law) (1994), *reprinted in* 1994 U.S.C.C.A.N. Vol. 6, 4040 (hereinafter "*SAA*").[6]

In the DSU, the parties established a Dispute Settlement Body authorized to adopt panel or Appellate Body reports addressing disputes arising under the agreements. The panel or Appellate Body reports contain conclusions addressing whether the identified measures conform with agreements covered by the DSU, but otherwise contain *recommendations only*:

> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall *recommend* that Member concerned bring the measure into

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103-316, Vol. 1, at 1654-78 (1994).

[6] For ease of reference, page citations to the SAA will reflect the pagination of H.R. Doc. No. 103-316, which is also reproduced in 1994 U.S.C.C.A.N. Vol. 6, 4040.

> conformity with that agreement. In addition to its *recommendations*, the panel or Appellate Body may *suggest ways* in which the Member concerned *could* implement the recommendations.

DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994) (emphasis added; footnotes omitted). Thus, as explained at length in the *SAA*:

> It is important to note that the new WTO dispute settlement system does not give the panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences.

SAA at 1008. And again:

> When it finds that a government's measure is inconsistent with a Uruguay Round Agreement, a panel or the Appellate Body must issue a recommendation to that government to bring the offending measure into conformity with the agreement. While the panel or Appellate Body may also suggest ways to implement such a recommendation, Article 19 makes it clear that any such suggestion is non-binding. Any decision on whether or how to implement such a recommendation is entirely a matter for the country concerned.

SAA at 1015.

Thus, after an adverse finding, an affected country may choose among various actions, including doing nothing:

> The defending country may choose to make a change in its law. Or it may decide instead to offer trade "compensation" – such as lower tariffs. The countries concerned could agree on compensation or on some other mutually satisfactory solution. Alternatively, the defending country may decide to do nothing. In that case, the country that lodged the complaint may retaliate by suspending trade concessions equivalent to the trade benefits it has lost.

SAA at 1009. *See also* DSU, Arts. 3.7 and 22.1-2, *reprinted in* H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1668. In addition, the dispute settlement decisions cannot modify the parties' rights or obligations under the agreements, and parties always retain the right to seek an authoritative interpretation of any Agreement from the Ministerial Conference or General Council of the WTO. *SAA* at 1010; DSU Arts. 3.2, 3.9 and 19.2, *reprinted* in H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1667.

Finally, dispute settlement decisions, even if final, "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." WTO, *Japan - Taxes on Alcoholic Beverages, AB-1996-2*, WT/DS8/AB/R (Oct. 4, 1996), Section E (status of adopted panel reports); WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug.

24, 1998), par. 7.30; WTO, *United States - Tax Treatment for "Foreign Sales Corporations,"* AB-1999-9, WT/DS108/AB/R (Feb. 24, 2000), par. 108.[7]

E. Commerce's calculation of weighted average dumping margins, in its statutory context

"The terms 'dumped' and 'dumping' refer to the sale of goods at less than fair value." 19 U.S.C. § 1677(34). The "dumping margin" is the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). The "weighted average dumping margin" is the percentage obtained by dividing the "aggregate dumping margins" by "the aggregate export prices and constructed export prices

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[7] As such, the interpretations found in the panels' various decisions are *not* rules of general application nor are they widely accepted. Hence, they do not constitute "the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See Restatement of the Law, Third, The Foreign Relations Law of the United States*, Vol. I, §101 (defining international law, as used in the restatement, as "rules and principles of general application") and §102(3) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1154 (7th Cir. 2001) (not applying *Charming Betsy* where international law consisted of evolving customary law).

...." 19 U.S.C. § 1677(35)(B).[8]

To obtain the *denominator* in the weighted-average dumping margin calculation (the aggregate prices), Commerce aggregates all prices, as observed in all transactions, whether or not dumped. Commerce's calculation of the denominator of the weighted-average dumping margin is not contested.

To obtain the *numerator* of the weighted-average dumping margin calculation (the aggregate dumping margins), Commerce totals the dumping margins, *i.e.*, the amounts "by which the normal value exceeds the export price or constructed export price," in the sales where this is the case (*i.e.*, the dumped sales). The non-dumped sales do not have any amount of dumping. The dumping margin is thus "zero," and no amount is added to or subtracted from the aggregate amounts of dumping found. This calculation

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[8] The definitions of "dumping margin" and "weighted average dumping margin," added to the statute in 1994, were substantially identical to definitions in Commerce's pre-existing regulations. *See* Uruguay Round Agreements Act, 103d Cong. 2d Sess., S. Rep. No. 103-412 at 79-80 (1994); 19 C.F.R. § 353.2(f)(1) (1993) ("'*Dumping margin*' means the amount by which the foreign market value exceeds the United States price of the merchandise") and (f)(2) ("The '*weighted-average dumping margin*' is the result of dividing the aggregated dumping margins by the aggregated United States prices.") (italics in original); *Antidumping Duties, Final Rule*, 54 Fed. Reg. 12742, 12770 (Dep't Comm. Mar. 28, 1989).

method has come to be known (among its opponents in particular) as "zeroing."

The incidence of fair sales reduces the weighted-average dumping margin, because *all* sales, including sales sold at fair value, are included in the denominator of the calculation. Commerce's methodology, however, does not permit the amounts by which some sales are *not* dumped to offset the actual dumping margins found in dumped sales.

F. Prior judicial review of the Commerce's method

Commerce's method has been approved as lawful under U.S. law by the CAFC on three occasions, regardless of adverse WTO decisions. *Timken Co. v. United States,* 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1346 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *Corus Staal BV v. United States,* 502 F.3d 1370, 1375 (Fed. Cir. 2007).

It has also been upheld numerous times by the Court of International Trade. *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996). And, more recently, applying the law as modified in 1994, *Timken Co. v. United States*, 240 F. Supp.2d 1228, 1242-44 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert.*

denied sub nom. Koyo Seiko Co., Ltd. v. United States, 543 U.S. 976 (2004); *Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp.2d 1253, 1264-65 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp.2d 1362, 1373 (Ct. Int'l Trade 2003); *Corus Engineering Steels Ltd. v. United States*, 27 CIT 1286, 2003 WL 22020504, Slip Op. 03-110 at 18 (Ct. Int'l Trade Aug. 27, 2003); *Slater Steels Corp. v. United States*, 297 F. Supp.2d 1351, 1359 (Ct. Int'l Trade 2003), *aff'd on other grounds*, 159 Fed. Appx. 1007 (Fed. Cir. Dec. 6, 2005); *NSK Ltd. v. United States*, 346 F. Supp.2d 1312, 1321 (Ct. Int'l Trade 2004) (Pet. at App B), *aff'd on other grounds*, 481 F.3d 1355 (Fed. Cir. 2007) (Pet. at App. A), *petition reh'g denied* (May 3, 2007) (Pet at App. C) (re the instant case); *Corus Staal BV v. United States*, 387 F. Supp.2d 1291, 1300 (Ct. Int'l Trade 2005), *aff'd*, 186 Fed. Appx. 997 (Fed. Cir. 2006), *rehearing en banc denied* (CAFC No. 05-1600, Sept. 12, 2006), *cert. denied*, 127 S. Ct. 3001 (No. 06-1057, June 25, 2007);[9] *NSK Ltd. v. United States*, 416 F. Supp.2d 1334, 1338-39 (Ct. Int'l Trade 2006); *Paul Müller Industrie GmbH & Co. v. United States*, 435 F. Supp.2d 1241, 1245 (Ct. Int'l Trade 2006), *reconsideration on other grounds denied by*, 442 F. Supp.2d 1363 (Ct. Int'l Trade 2006), *appeals filed* (Fed. Cir. 07-1547, -1563) (Sept.

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[9] Petitioners offered similar arguments (*i.e.*, circuit conflict with respect to an alleged change in agency policy, international obligations).

11, 2007); *Koyo Seiko Co. Ltd. v. United States*, 442 F. Supp.2d 1360, 1363 (Ct. Int'l Trade 2006) (motion to amend complaint denied – noting Federal Circuit precedent re zeroing); *Dorbest Ltd. v. United States*, 462 F. Supp.2d. 1262, 1316-17 (Ct. Int'l Trade 2006); *Corus Staal BV v. United States*, 2006 WL 2056401, Slip Op. 06-112 at 6 (Ct. Int'l Trade July 25, 2006); *SKF USA Inc. v. United States*, 491 F. Supp.2d 1354, 1365-66 (Ct. Int'l Trade 2007), *appeal filed* (Fed. Cir. 07-1502) (Aug. 9, 2007); *Koyo Seiko Co., Ltd. v. United States*, 2007 WL 2809332, Slip Op. 07-128 (Ct. Int'l Trade Sept. 27, 2007), *appeals filed* (Fed. Cir. 07-1556, -1557, -1558, 08-1038) (Sept. 14, 2007).

In addition, the courts have repeatedly rejected attempts to stay litigation regarding Commerce's method pending developments regarding adverse WTO decisions. *E.g.*, in litigation regarding the bearings antidumping orders: Order of the U.S. Court of Appeals for the Federal Circuit, *NSK Ltd. v. United States*, Appeal No. 05-1296, at 3 (May 30, 2006) (re the instant case – Order simultaneously entered in Appeal Nos. 05-1297, -1323) ("As we have indicated in an earlier order, we are not persuaded that stays pending resolution of the WTO proceedings is [*sic*] warranted."); Order of the U.S. Court of Appeals for the Federal Circuit, *SNR Roulements v. United States*, Appeal Nos. 05-1297, -1322, -1323, at 3 (June 30, 2005) ("Koyo's motion for a stay pending completion of WTO proceedings is denied.").

REASONS FOR DENYING THE PETITION

I. The Court of Appeals for the Federal Circuit correctly declined to set aside Commerce's decision on the basis of an adverse decision of the World Trade Organization

Petitioners assert that the CAFC's refusal to set aside Commerce's decision undermines the decision of the Executive Branch to implement the WTO decision, by effectively precluding Commerce from applying any changes to the entries that were the subject of the twelfth annual review. Pet. at 23-26. They also assert that this Court's precedent requires a remand to permit the agency to apply its new policy to this determination that is the subject of its appeal. *Id.* at 21-23. None of these arguments withstand scrutiny.[10]

A. The result sought by the petitioners is precluded by the statute

The URAA, in Section 129, 19 U.S.C. § 3538, contains express instruction regarding the implementa-

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[10] Moreover, NTN did not raise this issue in regular briefing before the agency, the CIT, or the CAFC. *Supra*, at 9. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). The issue, however, was considered by the CAFC upon NTN's motion for stay and petition for rehearing. *Supra* at 10; Pet. at 16-17.

tion of a WTO decision that an agency action in a particular proceeding does not conform with WTO agreements. The statute prescribes that such an implementation determination "*shall apply* with respect to unliquidated entries of subject merchandise ... that are entered, or withdrawn from warehouse, for consumption on or *after ... the date on which the United States Trade Representative directs the administering authority ... to implement that determination.*" 19 U.S.C. § 3538(c)(1)(B) (emphasis added).[11]

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[11] As also explained in the Statement of Administrative Action:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) [19 U.S.C. § 3538(c)(1)] provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [sic]

The entries at issue here concern merchandise imported between May 1, 2000 and April 30, 2001. Thus, the entries that were the subject of the annual review are statutorily out of the reach of any future implementation determination, and the result sought by the petitioners is precluded by the statute.

Consistent with the statute's mandate, Commerce's Section 129 decisions to date have never made changes to entries which pre-dated the direction from the USTR to Commerce to implement a decision of the WTO Dispute Settlement Body. The petitioners cite no such decisions, because there are none. For example, in its recent Section 129 decisions implementing the WTO decision regarding zeroing in *original investigations*, Commerce revoked certain antidumping orders. The revocation, however, did not apply to entries which predated the date of implementation directed by the United States Trade Representative. *Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders,* 72 Fed. Reg. 25261 (Dep't Comm. May 4,

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Trade Representative's direction would remain subject to potential duty liability.

SAA at 1026 ("Effect of Determination"). Similar explanations and instructions are found in the House and Senate reports. 103d Cong., 2d Sess., H.R. Doc. No. 103-826(1) at 39 (1994), *reprinted in* 1994 U.S.C.C.A.N., Vol. 6, 3773, 3811; S. Rep. No. 103-412 at 27 (1994).

2007), Issues and Decision Memorandum of Apr. 9, 2007, at 17,[12] available at: www/ia/ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-mem.200700410.

B. There is no reason to remand to allow the agency to apply a new policy, because there has been no change in the agency's policy

Petitioners assert that the CAFC's continued affirmance of Commerce's zeroing practice is at odds with this Court's instruction in *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974) that a matter should be remanded to the agency where there has been a change in agency practice or policy. Pet. at 21-23.

Petitioners' argument is premised on the existence of a change in agency policy. Here, there has been no change. Commerce has *not* abandoned, or announced that it would abandon, any part of the methodology employed to calculate weighted-average

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[12] *Accord, Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 71936, 71937 (Dep't Comm. Dec. 3, 2002), applying newly calculated rates to "unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after November 22, 2002," which was the date USTR directed Commerce to implement the Section 129 determination.

dumping margins in annual reviews. Commerce has announced a change with respect to the calculation of estimated weighted-average dumping margins in original *investigations*—but this change does *not* apply to annual reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006).[13] Indeed, Commerce, when announcing the change in practice with regard to investigations, expressly rejected the suggestion of some commenters that the change adopted by Commerce for purposes of *investigations* should also be applied in *other segments* of antidumping proceedings (such as reviews):

> In its March 6, 2006 **Federal Register** notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

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[13] In addition, it is the position of Timken that the antidumping statute mandates the "zeroing" methodology. *Supra*, page 14, discussing the methodology in its statutory context. Thus, Commerce does not have the authority to change its practice, whether in investigations or annual reviews.

71 Fed. Reg. 77722, 77724 (emphasis in original). *See also, infra*, reviewing the ways in which the United States may abide by its international obligations.

Petitioners' argument further fails because it does not account for the specific statutory instruction. Assuming, *arguendo*, that there was a change, there is no need "to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act," *Food Store Employees Union*, 417 U.S. at 10 n.10, because here there is express statutory instruction regarding the temporal reach of any change. Here, the statute precludes application of a change to entries imported prior to the date the USTR directs implementation.

C. The Court of Appeals for the Federal Circuit was not at liberty to set aside current law in order to anticipate (yet unknown) implementation decisions that can be made only by the Executive Branch

First, petitioners assume that the Executive Branch, for all intents and purposes, has *already* implemented the WTO's adverse decision, and has done so by abandoning zeroing in reviews. *See* Pet. at 25 ("[a]ll that remains is the details of the U.S.'s implementation ..."). That assumption is plainly incorrect.

No implementation decision has yet been made. As reflected in the DSU itself, in the U.S. statute implementing the WTO Agreements, and in the *SAA*

accompanying the statute, the U.S. executive branch, in consultation with the Congress, may choose any number of different responses to an adverse WTO report, including: (a) doing nothing; (b) negotiating a resolution between the U.S. and the aggrieved WTO Member or Members; and (c) modifying U.S. law or practice to bring itself into conformity with its WTO obligations as construed by the WTO panel or Appellate Body. 19 U.S.C. §§ 3538(b)(4) (the USTR "*may*, after consulting with the administrative authority and the congressional committees...direct the administering authority to implement, *in whole or in part*....") (emphasis added) and 3533(f)(3) (requiring the USTR to consult with congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation.") (emphasis added); DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994); *SAA* at 1008-09. *Supra*, 11 (section discussing effect of WTO dispute settlement decisions). Each of these actions would be consistent with the international obligations of the United States, and none of them *necessarily* includes a recalculation of the antidumping duties on the subject entries. As yet, no implementation decisions have been made. Moreover, Commerce has not adopted any change, or proposed any change. Nothing is known about the substance or reach of any potential new methodology, should one in fact be adopted. Moreover, even if an implementation deci-

sion had been made, and that decision included a modification of the zeroing method, the effect of such decision is not certain.[14] In other cases, the application of new methods has not necessarily resulted in lower margins.[15]

Second, until implementation is complete, the statute reserves no role for the U.S. courts in the implementation of WTO decisions. That role is assigned exclusively to the Executive Branch. 19 U.S.C. §§ 3533(f) (action by the Executive Branch following circulation of a panel report or Appellate Body decision); 3533(g) (agency action following decision by a panel or Appellate Body that a regulation or practice of an agency is not consistent with any of the Uruguay Round Agreements); 3538(a) and (b) (administrative action by Commerce or the International Trade Commission following adverse panel or

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[14] Pet. at 7, asserting that the change will reduce Petitioners dumping margin to zero.

[15] In one instance, in the course of implementing a WTO decision, Commerce revised its calculation method as used in an investigation (not an annual review) and margins *in*creased. Compare *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36067, 36069 (Dep't Comm. May 22, 2002) with *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22636, 22645 (Dep't Comm. May 2, 2005).

Appellate Body decisions); 3538(c) (effect of implementation determinations). Moreover, no person other than the United States may challenge, in any action under any provision of law, any action or inaction by a U.S. agency, on the grounds that such action or inaction is not consistent with any of the Uruguay Round Agreements. 19 U.S.C. § 3512(c)(1). The relief requested by the petitioners (that the CAFC should set aside a lawful decision of Commerce on the basis of an adverse decision by the Appellate Body, in anticipation of putative implementation decisions by the Executive Branch) impermissibly circumvents this statutory scheme.

The courts, meanwhile, must review the agency's decisions under the U.S. law that governs at the time the court makes its decision. *See, e.g., Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711-12 (1974); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991). A choice of law issue *may* arise at such a time when the law has in fact changed, and a court may *then* be called upon to decide whether its decision is governed by the new law governing at the time of the court's decision or the prior law. *See, e.g., J. B. Beam*, 501 U.S. at 534-35. But here no such choice of law issue arises, because no modification has yet been adopted (and no such modification could be applied to the entries in issue). And, in any event, here the temporal reach of any change is expressly addressed in the statute.

Thus, the Appellate Court, recognizing that Commerce's practice was lawful under existing U.S. law, and respecting the statute's detailed instruction regarding the implementation of adverse WTO dispute

settlement decisions, correctly declined to remand.

II. The Court of Appeals for the Federal Circuit and the Court of International Trade correctly affirmed Commerce's recalculation of NTN's freight expenses

NTN argues that the Supreme Court "is the only court remaining to police Commerce's violations" of 19 U.S.C. §§ 1677e(a), governing Commerce's reliance on "facts available," 1677e(b), governing Commerce's reliance on "adverse inferences," and 1677m(d), governing Commerce's duty to notify respondents of deficiencies in the information received by Commerce. Pet. at 26-30.

Petitioner's arguments were addressed by the Court of Appeals for the Federal Circuit and the Court of International Trade. As reviewed therein, Commerce's rejection of the data as offered by NTN was justified because: (1) NTN did not explain why allocating freight expenses by sales value (as was done by NTN) was not distortive (Pet. at 7a-8a and 78a); (2) NTN did not explain why allocation by weight (as Commerce asked for) would be "at least as distortive" as NTN's allocation by sales value (*Id.* at 8a and 78a-79a); and (3) NTN did not explain why allocation by sales value was the most specific feasible method (*Id.* at 8a and 78a).

In addition, Commerce justifiably relied on "facts available," as required by 19 U.S.C. § 1677e(a), because NTN did not supply weight data (requested by Commerce to permit Commerce to reallocate the adjustment), even though weight information was

available to NTN. Pet. at 8a, 78a and 80a. Commerce also justifiably applied "adverse inferences." The statute, 19 U.S.C. § 1677e(b), permits such inferences if a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. Here, NTN declined to provide usable data even after two requests by Commerce. Pet. at 11a and 80a. In addition, Commerce found that NTN's "summary statements" in response to those two requests did not amount to a legitimate attempt to provide Commerce with a complete and full demonstration of the accuracy of NTN's allocation method. *Id.* at 10a-11a and 79a-80a.

Finally, Commerce fully complied with 19 U.S.C. § 1677m(d). The statute requires that Commerce "shall promptly inform" the submitter of information "of the nature of the deficiency" in the submitted information, and provide the submitter, "to the extent practicable" with an opportunity to "remedy or explain the deficiency." *Id.* As reviewed by the Court of Appeals, that requirement was satisfied when Commerce forwarded a supplemental questionnaire, which reviewed Commerce's concerns regarding NTN's allocation of the freight adjustment. Pet. at 8a, n1.

CONCLUSION

For all of the reasons stated above, Timken prays that this Honorable Court deny the petition for a *writ of certiorari*.

Respectfully submitted,

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